Local 3, International Brotherhood of Electrical Workers, AFL–CIO (Fischbach and Moore) ***and*** **Norman McMichael.** Case 29–CB–7625

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On February 5, 1992, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We disagree with our dissenting colleague that the judge improperly excluded certain evidence. The excluded evidence is designed to show that McMichael had insufficient funds on deposit to cover the checks on March 30. However, even assuming arguendo that the bank records would show insufficient funds on March 30, this would not establish that McMichael ''willfully and deliberately sought to evade his union-security obligations.'' To the contrary, McMichael frankly admitted to the Respondent on March 26 that he had insufficient funds on that date and he requested that the checks be postdated and held until March 30. These are hardly the actions of someone who is trying to hoodwink the Respondent and not pay his dues. Further, even if McMichael had insufficient funds on deposit on March 30, that would not establish that, on March 26, he had no intention of depositing the requisite funds. Finally, even if he had no such intention, that would not diminish the unfairness of the Respondent's conduct. The Respondent promised McMichael that it would hold the check until March 30, a Friday. It broke that promise and McMichael did not learn of the problem until Saturday, March 31. The Respondent summarily caused McMichael's discharge for nonpayment on Monday, April 2. In these circumstances, we do not believe that the Respondent acted fairly toward McMichael when it summarily caused his discharge.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

CHAIRMAN STEPHENS, dissenting.

I would remand this proceeding to the administrative law judge because of the judge's failure to permit the Respondent to present evidence relevant to one of its defenses to the complaint. The complaint alleges that the Respondent violated Section 8(b)(1)(A) and (2) by causing the discharge of Charging Party Norman McMichael pursuant to a union-security dues provision, without giving adequate notice to McMichael that his dues were in arrears. One of the Respondent's defenses to the complaint is that McMichael willfully and deliberately sought to evade his union-security dues obligations and, therefore, any failure to notify McMichael of his dues obligations was excused. See *I.B.I. Security*, 292 NLRB 648, 649 (1989); *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB 117, 124 (1974). Cf. *Operating Engineers Local 542C (Ransome Lift)*, 303 NLRB 1001 fn. 3 (1991). My review of the record convinces me that, at the hearing, the judge erroneously considered McMichael's alleged acts of evasion to be irrelevant and, accordingly, his exclusion of evidence pertinent to the alleged evasion unduly limited the Respondent's ability to impeach McMichael's credibility regarding this matter.

The majority finds that McMichael was not trying to ''hoodwink'' the Respondent in order to evade his dues obligations. At the hearing, however, the judge ruled that McMichael's intentions were irrelevant. Thus, the judge ruled that the issue was ''not what [McMichael] was trying to do, but what the Respondent did.'' Consistent with that ruling, the judge refused repeatedly to permit the Respondent to attack McMichael's credibility by attempting to show that McMichael never intended to cover the checks he wrote to the Respondent. In his decision, however, the judge evidently had a change of heart regarding the relevance of McMichael's intentions. Thus, the judge found in his decision ''there is no evidence that McMichael was acting in bad faith or attempting to avoid his dues obligations.'' In my view, it is anomalous and unfair to find ''no evidence'' when, at the hearing, the Respondent was precluded from pursuing such evidence.[1] In these circumstances, I would re-

[1] If the Respondent had waited until March 30 to deposit the checks and if they had nonetheless bounced, a different result might well be warranted.

[1] The majority finds that the Respondent's premature presentment of the checks prior to March 30 (the checks were dated March 30) caused the problem of their being rejected for insufficient funds, but that if the Respondent had, instead, presented the checks on March 30 and they still bounced ''a different result might well be warranted.'' However, if McMichael acted in good faith, as the majority finds on this record, presumably he would either have deposited sufficient funds by March 30 to cover the checks or had a plausible explanation for failing to do so. Because McMichael had no knowledge until March 31 of the Respondent's premature presentment, it

mand this proceeding to the judge and direct him to permit the Respondent to develop this line of inquiry. Thus, in the absence of an adequately developed record, I express no opinion on the merits of the General Counsel's case-in-chief or the Respondent's defense.

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logically follows that the premature presentment had no bearing on McMichael's conduct between March 26 and 30. Accordingly, the distinction that the majority poses between a premature and a timely presentment only reinforces my view that a hearing is warranted to explore McMichael's conduct.

Brian F. Quinn, Esq., for the General Counsel.
Norman Rothfeld, Esq., for the Respondent.

DECISION

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on January 28, 1991, in Brooklyn, New York.

On March 14, 1990, Norman McMichael, an individual, filed a charge against Local 3, International Brotherhood of Electrical Workers, AFL–CIO (Respondent) alleging that Respondent had caused Fischbach & Moore, Inc. (the Employer) to discharge McMichael because of his unlawful expulsion from membership in Respondent.

On June 22, 1990, a complaint issued alleging that Respondent had caused the above discharge in violation of Section 8(b)(1)(A) and (2) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, the briefs submitted by the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

The Employer is a New York corporation with its principal office located in the borough of Queens in the City of New York where it is engaged in the business of electrical contracting at various locations throughout the New York City metropolitan area. The Employer annually purchases and receives goods products and materials at its New York locations valued in excess of $50,000 directly from points located outside the State of New York. I conclude the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admittedly is a labor organization within the meaning of Section 2(5) of the Act.

McMichael has been an electrician and a member of Respondent for about 28 years. In September 1989, McMichael tendered a check to Respondent for his union dues. When Respondent attempted to cash it, it was returned for insufficient funds. Respondent contends that it sent McMichael a notice concerning his check. McMichael testified that he did not receive such notice. In any event, from September 1989 through March 30, 1990, McMichael continued to work for a number of employers without incident. McMichael began his employment with the Employer on March 2, 1990.

On March 26, 1990, McMichael went to Respondent's office to pay his upcoming dues. At that time Respondent's clerical, who was on duty, notified him that his September 1989 check had been returned for insufficient funds. McMichael thereupon proceeded to make out a check covering the amount of the bounced check and another check covering the upcoming period of April 1 to September 30, 1990. He told the clerical handling his transactions that, to ensure that there were sufficient funds to cover the checks, he had postdated the checks to March 30, 1990.

On March 29, 1990, notwithstanding the postdated check, Respondent submitted the check to its bank for collection. On March 30, McMichael received his membership card from Respondent. Sometime before April 2, 1990, Respondent received notification from its bank that there were insufficient funds in McMichael's account to cover his checks. On April 2, 1990, McMichael reported for work with the Employer. Before starting work McMichael was told to meet with the foreman on the job. He was then told by the job foreman that William Blaine, financial secretary of Respondent, had called and told him that McMichael's union dues were not paid up, and that he should not be permitted to start work.

Following his conversation with the job foreman, McMichael telephoned Respondent and spoke to Blaine who told him to report to the union office and meet with him. Following this call McMichael met with Blaine at Respondent's office. During this meeting McMichael credibly testified that Blaine told him he could no longer work for the Employer because his dues were not paid. Presumably Respondent had received notification from its bank that the two postdated checks tendered by McMichael described above had been returned for insufficient funds. Blaine also showed him a letter allegedly sent to him concerning his bounced September 1989 check. McMichael denied receiving such letter. As a result of his conversation with Blaine, McMichael did not attempt to return to his job with the Employer. Blaine did not deny McMichael's testimony concerning his statement to McMichael that in view of his nonpayment of dues, he could no longer work for the Employer. Blaine did testify that pursuant to the union-security provisions of their collective-bargaining agreements with employers in the industry, if an employee's dues were not paid up and they are not members in good standing Respondent invariably enforces its union-security provisions with the respective employers concerned. In other words, an employee not a member in good standing with Respondent would not be permitted by Respondent to work for an employer under contract with Respondent. Nevertheless, Blaine denied that he notified the Employer to terminate McMichael. Blaine then showed McMichael a copy of Respondent's October 1989 letter informing him that he was delinquent in his dues. McMichael said he was unaware of such letter.

On April 12 and 23, McMichael made attempts to tender his back dues to Blaine. However Blaine refused to accept the checks. At some unspecified time thereafter, McMichael was reinstated into Respondent's labor organization.

Discussion

It is well settled that a union owes a fiduciary duty to employees it represents as the exclusive collective-bargaining representative to deal fairly and honestly with them. And if a union fails in such fiduciary duty, it forfeits the rights pursuant to a lawful union-security provision to demand the discharge of an employee who becomes delinquent in his union dues. Such fiduciary includes, at a minimum, the fulfillment of all the following prerequisites to a demand for discharge;

a statement of the precise amount owed, the method of computation, and a reasonable opportunity for the employee to meet his dues obligation. *NLRB v. Hotel Employees Local 568 (Philadelphia Sheraton Corp.)*, 320 F.2d 254 (3d Cir. 1963), enfg. 136 NLRB 888 (1962).

Whether Respondent sent McMichael a dues delinquent letter in October 1989, is immaterial to the disposition to this case. It is clear that Respondent took no action in connection with such alleged letter.

The issue is whether Respondent fulfilled its fiduciary relationship to McMichael concerning his attempt to pay his back and current dues obligations in March 1990. In this regard, the evidence establishes that McMichael made a good-faith tender of his dues on March 26 when he tendered two checks, one for back dues and one for current dues, which were accepted by Respondent. The checks were dated March 30, the due date. Presumably, had they been deposited at that date there would have been sufficient funds to cover these checks. Yet, notwithstanding such date, Respondent attempted to cash the checks on March 29. Under these circumstances there is no evidence that McMichael was acting in bad faith or attempting to avoid his dues liability. What is critical to the decision in this case is that Respondent utterly failed to provide McMichael with any notice prior to affecting his termination by the Employer pursuant to the union-security provisions of its collective-bargaining agreement with the Employer. In this connection McMichael received his membership card on or about April 1, 1990. The first notification McMichael received of any dues delinquency was on April 2, when he was informed by an Employer representative that he could no longer work for the Employer until he met with Blaine and straightened out his dual obligations. Therefore until the morning of April 2, McMichael could reasonably assume that all his dues obligations were satisfied.

On April 2, when McMichael met with Blaine he was informed for the first time that his dues were in arrears and that Blaine had informed the Employer that McMichael was no longer a member in good standing and could no longer work for the Employer. As set forth above, although Blaine did not admit that he contacted the Employer to tell him this, he did testify quite unequivocally that Respondent does not permit members who are not in good standing to work. Thus, I find that Respondent, by its agents, caused the Employer to terminate McMichael on April 2 pursuant to its union-security provisions with the Employer, and without any notice to McMichael. Under these circumstances, Respondent failed to meet its fiduciary obligation of providing McMichael a reasonable opportunity to meet his dues obligation before enforcement of its union-security provisions. In fact Respondent provided McMichael with no opportunity. I find that by such conduct, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. The Employer is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By causing the Employer to discharge Norman McMichael because he failed to pay his union dues and remain a member of Respondent in good standing, without giving McMichael any notice that such failure would result in his discharge, or providing McMichael with reasonable time to satisfy his dues obligations, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that Respondent violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent Union caused Fischbach & Moore, Inc. to unlawfully discharge Norman McMichael, I shall recommend that Respondent Union notify the above employer, in writing, with a copy to McMichael, that it has no objection to the reinstatement of McMichael, and that it requests McMichael be reinstated. I shall also recommend that Respondent Union be ordered to make McMichael whole for any loss of wages and benefits he may have suffered as as result of the Respondent Union's action until McMichael has been reinstated by the above-named employer to his former or substantially equivalent job, or he obtains substantially equivalent employment elsewhere, less his net interim earnings. *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981). The amount of backpay shall be computed with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Local 3, International Brotherhood of Electrical Workers, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Fischbach & Moore, Inc. to discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Norman McMichael for any loss of wages or other rights and benefits he may have suffered as the result of its discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Notify Fishback & Moore, Inc., in writing, with a copy to McMichael, that it has no objection to the employment of Norman McMichael, and that it requests that McMichael be reinstated.

(c) Expunge from its records any reference to the unlawful discharge of Norman McMichael and notify him, in writing, that this has been done and that evidence of his unlawful dis-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

charge shall not be used as a basis for future action against him.

(d) Post at its business office and meeting hall copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Deliver to the Regional Director for Region 29 signed copies of the notice in sufficient numbers to be posted by Fishbach & Moore, Inc., in all places where notices to employees are customarily posted, if it is willing. Ask the Employer to remove any references to McMichael's unlawful discharge from the Employer's files and notify McMichael that it has asked the Employer to do this.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to cause, or attempt to cause, Fischbach & Moore, or any other employer, to discharge or otherwise discriminate against Norman McMichael, or any other employee: (1) for failure to tender periodic dues or initiation fees without adequately advising him of his obligations, in violation of Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT in any like or related manner restrain or coerce employee in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL reimburse Norman McMichael for any loss of wages or other rights and benefits he may have suffered as a result of our discrimination against him on April 2, 1990, plus interest.

WE WILL expunge from our files any reference to our request for the discharge of Norman McMichael and notify him in writing that this has been done and that evidence of this unlawful request will not be used as a basis for future action against him, and WE WILL ask the Employer to remove any reference to McMichael's unlawful discharge request from its files and will notify McMichael that we have asked the Employer to do this.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS